

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 61614-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
RICARDO CORTEZ KINER, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 6, 2009
_____	)	

AGID, J.—Ricardo Kiner, Jr., violated a domestic violence no-contact order for the third time by assaulting A.P. The State charged him with a felony violation of a no-contact order, a crime that requires the State to prove either two previous violations or that he violated the protective order by committing an assault. Kiner waived his right to a jury trial after the trial court decided not to bifurcate proceedings on the prior convictions element of the crime charged. Kiner appeals from his conviction following a bench trial, arguing that the trial court’s decision to hold unified proceedings denied him his right to a fair trial. We hold that Kiner waived appellate review of this issue by failing to object to the trial court’s decision not to bifurcate proceedings on the prior convictions element of his crime. And because due process does not require

bifurcated proceedings when a prior conviction is an element of the crime charged, we hold that the outcome would have been the same even if Kiner's trial lawyer had preserved the issue for review.

## FACTS

Early in the morning on November 3, 2007, a witness was awakened by someone yelling outside her apartment. After the yelling got louder, the witness looked outside and saw a man yelling at a woman. The man pushed the woman, hit her, and "shoved her really hard" as she was trying to get away, knocking her to the ground. The witness "was afraid for the girl" and called 911. The police came and questioned Kiner as he was walking out of a nearby building. Kiner gave officers a false name and then fled. Officers located Kiner and took him into custody.

The State charged Kiner with violating a December 21, 2006 domestic violence no-contact order that prohibited him from contacting A.P., the victim of this assault, until 2011. Kiner had already been convicted of violating this protective order twice, once on May 8 and again on August 30, 2007. The State charged this no-contact order violation as a felony because Kiner had two prior convictions for violating a no-contact order and because this violation involved an assault. The information also alleged a rapid recidivism aggravating factor and that Kiner committed the crime while on community placement. Kiner moved to bifurcate the rapid recidivism and community placement allegations. Kiner waived his right to a jury trial after the court agreed to bifurcate the community placement issue, but not the prior convictions element of the crime charged or the rapid recidivism aggravating factor.

During the bench trial, the witness identified a photograph of A.P. as the victim. The witness was not “100% sure” whether the defendant was the man she saw assaulting A.P. But the witness testified that she saw the police questioning the same man who had pushed, hit, and shoved the victim. Neither A.P. nor the defendant testified. The trial court found Kiner guilty as charged and sentenced Kiner to a mid-range sentence of 25 months of confinement. Although the trial court found that Kiner committed the offense shortly after his release from incarceration, it declined to impose a rapid recidivism exceptional sentence, reasoning that Kiner’s community custody status had already increased his standard range sentence.

#### DECISION

A no-contact order violation is a felony offense when the offender has at least two previous convictions for violating a no-contact order or when the defendant commits an assault that violates the order.<sup>1</sup> Thus, in order to convict Kiner of the crime charged, the State had to prove that he had two previous convictions or that he violated the protective order by assaulting A.P.

Kiner claims that the trial court violated his due process right to a fair trial by not bifurcating proceedings for the prior conviction element of the felony no-contact order violation charge. Although we generally review a trial court’s bifurcation decision for an abuse of discretion,<sup>2</sup> Kiner is asserting that the trial court was required to bifurcate proceedings as a matter of law. We review questions of law de novo.<sup>3</sup> The State first

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<sup>1</sup> RCW 26.50.110(4), (5).

<sup>2</sup> State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

<sup>3</sup> Id.

argues that appellate review here is limited to determining whether the facts found support the conclusions of law because Kiner did not challenge findings of fact on appeal. The State's proposition is true where the defendant challenges the sufficiency of the evidence without assigning error to the findings of fact,<sup>4</sup> but Kiner does not claim that the evidence does not support his conviction. Instead he alleges that the trial court violated his right to a fair trial. Accordingly, Kiner's decision not to assign error to the facts found does not affect our ability to review his fair trial claims.

The State next argues that Kiner waived appellate review of the trial court's decision by not moving to bifurcate proceedings on the prior convictions element of the felony charge against him and by not objecting when the trial court did not bifurcate that issue. The record supports the State's position.<sup>5</sup> Kiner argues that he sufficiently raised the issue before the trial court by objecting to the trial court's decision not to bifurcate the rapid recidivism aggravating factor proceedings. But under RCW 9.94A.535(3)(t), evidence of rapid recidivism is relevant only to support a sentence above the standard range, not for the purpose of proving an element of the crime. Accordingly, the trial court did not have the opportunity to consider the merits of Kiner's position that due process requires bifurcated proceedings when the State is required to

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<sup>4</sup> See State v. Munson, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004) (holding that review is limited to determining whether the findings support the conclusions of law when the appellant only challenges the sufficiency of the evidence) (citing State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001)); see also Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 53, 586 P.2d 870 (1978).

<sup>5</sup>The prior convictions issue came up during a pretrial exchange between the prosecutor and the court. In that exchange, the trial court considered the prejudicial effect of allowing the State to introduce prior convictions and whether a statute allowed for bifurcating a jury trial on the elements of a felony no-contact order violation. Kiner did not ask the trial court to consider the due process implications of not bifurcating the prior convictions proceedings.

prove prior convictions as an element of the crime charged.<sup>6</sup>

Kiner argues that he may nonetheless raise the issue on appeal because he claims that the trial court's decision was a manifest constitutional error having "practical and identifiable consequences in the trial of the case."<sup>7</sup> Here, the trial court did not commit a constitutional error: due process does not require bifurcated proceedings when prior convictions are an element of the crime charged.<sup>8</sup> In Roswell, the State charged the defendant with felony communication with a minor for immoral purposes, a crime that required the State to prove that Roswell had previously been convicted of a felony sexual offense.<sup>9</sup> The trial court denied Roswell's bifurcation request, and the State offered evidence of Roswell's prior felony sexual offense to the jury.<sup>10</sup> The Washington Supreme Court affirmed Roswell's conviction and held that he was not entitled to a bifurcated trial.<sup>11</sup>

The cases Kiner cites do not hold that a defendant's right to a fair trial bars the trial court from conducting unified proceedings. In State v. Kirkpatrick, the defendant was charged with burglary, grand larceny, and of being a habitual criminal.<sup>12</sup> Under the

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<sup>6</sup> See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). Kiner cites to State v. Burke for the proposition that this court may reach an issue on appeal where the trial court had an opportunity to consider the merits of an issue. 163 Wn.2d 204, 211, 181 P.3d 1 (2008). But here, unlike in Burke, the issue was not raised in the motion for a new trial and was not considered on its merits by the trial court.

<sup>7</sup> State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001) (citing RAP 2.5(a)(3)).

<sup>8</sup> Roswell, 165 Wn.2d at 195 ("It is well established that admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial."); Pettus v. Cranor, 41 Wn.2d 567, 568, 250 P.2d 542 (1952), cert. denied, 345 U.S. 967 (1953).

<sup>9</sup> State v. Roswell, 165 Wn.2d 186, 191, 196 P.3d 705 (2008).

<sup>10</sup> Id.

<sup>11</sup> Id. at 198.

<sup>12</sup> 181 Wash. 313, 315-16, 43 P.2d 44 (1935).

statute at issue in Kirkpatrick, being a habitual criminal was not a crime but a status that increased the penalty for a crime.<sup>13</sup> In Kirkpatrick, the Washington Supreme Court rejected the common law practice of joining trial for the substantive charges with the trial on the recidivist sentencing enhancement.<sup>14</sup> In State v. Sayward, the statute at issue increased the penalty for DUI when the defendant had a prior DUI conviction.<sup>15</sup> During Sayward's jury trial for DUI and three counts of negligent homicide by motor vehicle, the trial court allowed the State to present evidence of a prior DUI conviction.<sup>16</sup> The Supreme Court held that the "fundamental unfairness of the procedure followed in this case deprived [Sayward] of due process as to his trial on all four counts contained in the information."<sup>17</sup> Here, unlike in Sayward and Kirkpatrick, the State had to introduce evidence of the prior convictions to prove the crime charged, and it was not relevant only to penalty enhancements.<sup>18</sup>

Nor does State v. Bache hold that due process requires bifurcation when prior convictions are an element of the charged crime.<sup>19</sup> In Bache, the State charged the defendant with felony communication with a minor for immoral purposes and one count of felony indecent exposure.<sup>20</sup> Both crimes are misdemeanors unless the defendant

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<sup>13</sup> See Ex parte Towne, 14 Wn.2d 633, 636, 129 P.2d 230 (1942).

<sup>14</sup> Kirkpatrick, 181 Wash. at 316.

<sup>15</sup> 63 Wn.2d, 485, 486-87, 387 P.2d 746 (1963).

<sup>16</sup> Id. at 486.

<sup>17</sup> Id. at 493.

<sup>18</sup> Here, evidence of the most recent conviction was also relevant to a rapid recidivism finding. Because evidence of the most recent conviction was required to prove the prior convictions element of Kiner's felony charge, the trial court did not err by not bifurcating the rapid recidivism proceedings. Had Kiner not waived his right to a jury trial, the jury would have heard the evidence necessary to determine whether Kiner committed this offense shortly after being released from incarceration regardless of whether the trial court bifurcated the rapid recidivism proceeding.

<sup>19</sup> 146 Wn. App. 897, 193 P.3d 198 (2008).

has previously been convicted of a sex offense.<sup>21</sup> Bache asked the trial court to bifurcate the trial so that one jury would decide whether he had committed the current crimes and another jury would decide if he had previously been convicted of a sex offense.<sup>22</sup> The trial court did not bifurcate proceedings and did not require the State to prove that he had prior sex offense convictions.<sup>23</sup> Because prior convictions that serve as an element of the crime charged must be proved beyond a reasonable doubt, the Bache court held that the trial court erred by omitting an element of the crime in the elements instruction.<sup>24</sup> Citing to State v. Oster,<sup>25</sup> Bache advised that the prior conviction element of the crime charged “may be more properly addressed through a special verdict form” to minimize the risk of prejudice posed by evidence of prior convictions.<sup>26</sup>

In Oster, the trial court did not bifurcate proceedings on Oster’s previous no-contact order convictions during his trial for a felony violation of a domestic violence no-contact order.<sup>27</sup> Instead, the trial court provided the jury with a special verdict form that directed the jury to find whether Oster had previously been convicted of two no-contact order violations.<sup>28</sup> The Washington Supreme Court approved the trial court’s practice of “[i]nstructional bifurcation” through a special verdict form when prior convictions are

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<sup>20</sup> Id. at 900-01.

<sup>21</sup> Id. at 901.

<sup>22</sup> Id.

<sup>23</sup> Id. at 905.

<sup>24</sup> Id. at 905-06.

<sup>25</sup> 147 Wn.2d 141, 52 P.3d 26 (2002).

<sup>26</sup> Bache, 146 Wn. App. at 906.

<sup>27</sup> Oster, 147 Wn. App. at 147-48.

<sup>28</sup> Id. at 145.

elements of the crime charged even though the general rule from State v. Smith<sup>29</sup> is that the “to convict” instructions must contain all of the elements of the crime.<sup>30</sup> Oster does not hold that due process requires instructional bifurcation or bifurcated proceedings.<sup>31</sup> Accordingly, the trial court did not commit manifest constitutional error.

Kiner argues in the alternative that his lawyer deprived him of effective assistance of counsel by failing to preserve his fair trial argument on appeal. To demonstrate ineffective assistance, Kiner must show that defense counsel’s representation fell below an objective standard of reasonableness and that the deficient representation prejudiced him.<sup>32</sup> To show prejudice, Kiner must establish that there is a reasonable probability the result would have been different but for the deficient performance.<sup>33</sup> Here, Kiner’s lawyer waived appellate review of the trial court’s decision not to bifurcate proceedings on the prior convictions element by not asking for bifurcation and by failing to object to the trial court’s decision. But as we explained above, due process does not require bifurcation. Thus, the outcome would have remained the same even if Kiner’s trial counsel had preserved appellate review of that issue.

We affirm.

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<sup>29</sup> 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

<sup>30</sup> Oster, 147 Wn.2d at 147-48.

<sup>31</sup> Because Kiner waived his right to a jury trial, the trial court here did not have occasion to consider using a special verdict form.

<sup>32</sup> See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

<sup>33</sup> See State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001).

Ajid, J.

WE CONCUR:

Jan, J.

Appelwick, J.